**RAMAMURTHI RAMANI**

**v.**

**SRI RAM & CO**

COURT OF APPEAL, KUALA LUMPUR
SHAIK DAUD ISMAIL JCA
AHMAD FAIRUZ JCA
MOKHTAR SIDIN JCA
[CIVIL APPEAL NO: W-02-393-1996]
27 FEBRUARY 1998

***LEGAL PROFESSION:*** *Retainer - Oral instruction to solicitor - Effect thereof - Client denying such instruction made - Whether any evidence of repudiation of instruction - Whether solicitor having notice of such repudiation - Finding of fact by trial judge*

The defendant/appellant appointed the plaintiff/respondent to act for him as solicitors in a sale and purchase transaction of land belonging to the appellant. A sale and purchase agreement was entered into between the appellant and a company for RM20 million of which RM1 million was payable upon execution of the agreement. Of the balance, RM3 million was to be paid within two months of the purchaser obtaining FIC approval and the remaining RM16 million was to be deposited with the purchaser's solicitors as stakeholders until the stipulated time for release.

On 18 September 1994, RM1 million was released to the appellant. The purchaser also agreed to release on 22 September 1994 a sum of RM90,000 as an advance and part payment of the balance purchase price. According to the respondent, on or about 22 September 1994, a meeting between the appellant and Mr Kumar from the respondent's firm took place where the appellant instructed Mr Kumar to deduct the sum of RM700,000 from the balance deposit sum to be paid to the former partner of the firm, Mr Sri Ram. On 8 August 1995, the balance of the deposit payable ie, RM2,918,769.86 was paid to the respondent to be held by the respondent as stakeholder for the appellant. As instructed, the respondent then forwarded a cheque in the sum of RM2,152,304.86 being the balance due to the appellant after setting-off the respondent's professional fees of RM66,465 and the said sum of RM700,000. The appellant refused to accept the said cheque and requested a new cheque for the balance less the respondent's professional fees only. Mr Kumar then wrote to the appellant on 16 August 1995 wherein he said, "In

regard to the RM700,000 to be paid to Mr Sri Ram you will recall your instructions on the matter to our Mr Kumar." The appellant replied on 25 August 1995 stating, "I wish to state that there is no money owing by me to Mr Sri Ram."

As a result of this, the respondent applied for declarations that: (i) the respondent was entitled to act upon the instructions given to it by the appellant on or about 22 September 1994 to deduct the sum of RM2,918,769.86; and (ii) the respondent was at liberty to disburse the said sum of RM700,000 in accordance with the said instructions.

In his affidavit in reply, the appellant admitted that a meeting did take place between him and the former partner of the respondent but that Mr Kumar was not in attendance. He further denied agreeing to pay the sum of RM700,000. The learned judge allowed the reliefs sought and the appellant appealed against this decision.

The only issue before the Court of Appeal was whether the appellant had given an oral instruction to Mr Kumar to deduct the sum of RM700,000 from the balance of the deposit money to be paid to the appellant and that the RM700,000 was to be paid to the former partner of the respondent.

**Held:**
**Per Mokhtar Sidin JCA**

**[1]** The appellant in his affidavit and his letter of 25 August 1995 denied having met Mr Kumar, but there was no denial by the appellant in respect of the instruction given to the firm to make the deductions, *viz*, the RM700,000 and the fees. When the appellant took up the present action he took it against the whole firm and not against any specific solicitor. As such any instruction given to anybody in that firm appeared to be an instruction to the firm.

**[2]** An instruction purportedly given is binding unless there is evidence to show that the instruction given is denied or repudiated by one of the parties with the knowledge of the other. There were ample opportunities for the appellant to refute or deny the instructions given but the appellant failed to do so.

**[3]** Whether an instruction has been given or not, is a question of fact. In the present appeal the learned judge found that there was sufficient evidence to show that the appellant had given instructions to Mr Kumar to deduct the sum of RM700,000 which was to be paid to the former

partner of the respondent. The learned judge also found that there was no denial of that instruction given or any countermanding instruction otherwise. Since this was the finding of the trial judge and the appellant has not convinced the court that the finding of the learned judge was wrong, that finding must stand.

*[Appeal dismissed with costs.]*

*[**Bahasa Malaysia** Translation of Headnotes]*

Defendan/perayu telah melantik plaintif/responden untuk bertindak untuknya sebagai peguamcaranya di dalam satu perjanjian jualbeli hartanah yang dimiliki oleh perayu. Satu perjanjian jualbeli telah dimasuki antara perayu dan sebuah syarikat untuk RM20 juta dari mana RM1 juta adalah perlu dibayar apabila perjanjian tersebut ditandatangani. Dari bakinya, RM3 juta dikehendaki dibayar dalam tempoh dua bulan dari pembeli memperolehi kelulusan FIC dan baki RM16 juta dikehendaki didepositkan dengan peguamcara pembeli sebagai "stakeholder" sehingga masa yang ditetapkan untuk pelepasannya.

Pada 18 September 1994, RM1 juta dilepaskan kepada perayu. Pembeli juga bersetuju untuk melepaskan pada 22 September 1994 sejumlah RM90,000 sebagai pendahuluan dan bayaran sebahagian dari baki harga belian. Mengikut responden, pada atau sekitar 22 September 1994, satu perjumpaan telah diadakan di antara perayu dan Encik C Vijaya Kumar dari firma responden di mana perayu mengarahkan Encik Kumar untuk menolak jumlah RM700,000 dari baki jumlah deposit untuk dibayar kepada rakan kongsi lama firma tersebut, Encik G Sri Ram. Pada 8 Ogos 1995, baki deposit yang perlu dibayar iaitu RM2,918,759.86 telah dibayar kepada responden untuk dipegang oleh responden sebagai "stakeholder" untuk perayu. Sepertimana yang diarahkan, responden menghantarkan satu cek untuk jumlah RM2,152,304.86 iaitu baki yang kena dibayar kepada perayu selepas menolak fee profesional responden sebanyak RM66,465 dan jumlah RM700,000. Perayu telah enggan menerima cek tersebut dan memohon diberi cek baru untuk baki ditolak fee profesional responden sahaja. Encik Kumar selanjutnya menulis kepada perayu pada 16 Ogos 1995 di mana ia berkata, "In regards to the RM70,000 to be paid to Mr G Sri Ram you will recall your instruction on the matter to our Mr C Vijaya Kumar." Perayu telah menjawab pada 25 Ogos 1995 mengatakan, "I wish to state that there is no monies owing to Mr G Sri Ram."

Akibatnya, responden telah membuat permohonan untuk deklarasi-deklarasi bahawa: (i) responden berhak untuk bertindak atas arahan yang diberi oleh perayu pada atau sekitar 22 Septamber 1994 untuk menolak jumlah RM2,918,769.86; dan (ii) responden adalah bebas untuk melepaskan jumlah RM700,000 mengikut arahan tersebut.

Di dalam afidavit jawapannya, perayu mengatakan bahawa satu perjumpaan diadakan di antaranya dengan rakan kongsi lama responden tetapi Encik Kumar tidak hadir. Beliau menafikan persetujuannya kepada pembayaran RM700,000 itu. Yang arif hakim telah membenarkan relif-relif yang dipohon dan perayu telah merayu terhadap keputusan ini.

Isu yang didepan Mahkamah Rayuan hanyalah atas soalan samada perayu ada memberi arahan lisan kepada Encik Kumar untuk penolakan RM700,000 dan baki jumlah wang deposit untuk dibayar kepada perayu dan bahawa RM700,000 adalah untuk dibayar kepada rakan kongsi lama responden.

**Diputuskan:**
**Oleh Mokhtar Sidin HMR**

**[1]** Perayu di dalam afidavitnya dan suratnya bertarikh 25 Ogos 1995 menafikan perjumpaan dengan Encik Kumar, tetapi tiada penafian terhadap arahan yang diberi kepada firma untuk membuat penolakan tersebut iaitu RM700,000 dan fee tersebut. Adalah perlu diambil perhatian bahawa apabila perayu membuat tindakan ini ianya adalah terhadap segala firma dan bukan terhadap mana-mana peguamcara spesifik. Oleh itu, arahan yang diberi kepada sesiapa di dalam firma, kelihatan seperti arahan kepada firma tersebut.

**[2]** Sesuatu arahan yang diberi adalah mengikat kecuali terdapat bukti menunjukkan bahawa arahan yang diberi dinafikan atau dibatalkan oleh salah satu daripada pihak dengan pengetahuan pihak yang lain. Terdapat banyak peluang untuk perayu menafikan atau membatalkan arahan yang diberinya tetapi perayu gagal untuk berbuat demikian.

**[3]** Samada sesuatu arahan telah diberi atau tidak adalah soalan fakta. Di dalam rayuan ini yang arif hakim memutuskan bahawa terdapat cukup bukti bahawa perayu telah memberi arahan kepada Encik Kumar untuk menolak jumlah RM700,000 yang mana dikehendaki dibayar kepada rakan kongsi lama responden. Yang arif hakim juga memutuskan bahawa tiada penafian arahan tersebut atau arahan sebaliknya. Oleh kerana ini adalah keputusan hakim perbicaraan dan perayu tidak menyakinkan mahkamah bahawa keputusan yang arif hakim adalah salah, keputusannya adalah dikekalkan.

*[Rayuan ditolak dengan kos.]*

**Cases referred to:**

*Samar Mansor v. Mustafa Kamarul Ariffin [1974] 2 MLJ 71* ***(foll)***

*Taman Zahari Zabidi Sdn Bhd v. Adnan Sundra & Low & Anor [1990] 1 CLJ 891* ***(foll)***

*For the appellant - Muralitharan Krishanan; M/s K'Mura & Co*

*For the respondent - Porres Royen (Fiona Bodipalar with him); M/s Sri Ram & Co*

*[Appeal from High Court, Kuala Lumpur; Originating Summons No: R2-24-12-96]*

*Reported by Cindy Chan*

## JUDGMENT

**Mokhtar Sidin JCA:**

In the present appeal the defendant/appellant appointed the plaintiff/respondent to act for him as his solicitors on a sale and purchase transaction of a piece of land belonging to the appellant. The land was sold to Julung Perdana Sdn. Bhd. and a sale and purchase agreement dated 16 September 1994 was entered between the appellant and the above-mentioned company. The consideration was RM20 million of which RM1 million was payable upon execution of the agreement. Of the balance, RM3 million was to be paid within two months of the purchaser obtaining the necessary FIC approval and the balance RM16 million to be deposited with the purchaser's solicitors as stakeholders at the expiry of 36 months from the date of FIC approval to be released in accordance with the terms of the agreement.

Pursuant to that agreement, RM1 million was released to the appellant on 18 September 1994. The purchaser also agreed to release on 22 September 1994 a sum of RM90,000 as an advance and part payment of the balance purchase price. According to the affidavit of the respondent on/or about 22 September 1994 a meeting between the appellant and Mr. C. Vijaya Kumar from the respondent's firm took place where the appellant gave instruction to Mr. Kumar to deduct the sum of RM700,000 from the balance deposit sum to be paid to the former partner of the firm. On 8 August 1995 the balance of the deposit payable which was in the sum of RM2,918,769.86 was paid to the respondent to be held by the respondent as stakeholder for the appellant. Acting on the instructions given to Mr. Kumar, the respondent forwarded to the appellant a Bank of Tokyo cheque No. 388044 in the sum of RM2,152,304.86, being the balance due to the appellant after setting-off the firm's professional fees in the sum of RM66,465 and the aforesaid sum of RM700,000. By a letter dated 25 August 1995 the appellant refused to accept the cheque and requested the respondent to forward a cheque for the balance less only the firm's professional fees in the sum of RM66,465.

As a result of that the respondent wrote to the appellant stating that the RM700,000 was to be placed in a fixed deposit pending the decision of the court in respect of that sum. Apparently, the appellant agreed to this arrangement and on 30 August 1995 the RM700,000 was placed in a fixed deposit. The appellant then accepted the cheque for the balance which was given earlier.

The respondent then took up an originating summons seeking the following relief:

(a) a declaration that the respondents are entitled to act upon the instructions given to them by the appellant on/or about 22 September 1994 to deduct the sum of RM2,918,769.86 received by respondents as solicitors for the appellant on 8 August 1995; and

(b) a declaration that the respondents are at liberty to disburse the said sum of RM700,000 in accordance with the said instructions given by the appellant on or about 22 September 1994.

The appellant in his affidavit in reply admitted that the solicitors dealing with the sale of the property was the former partner of the respondent before he was elevated to the Court of Appeal. The appellant admitted that he had dealings with the former partner for a long long time. However, in the affidavit, the appellant denied having met Mr. Kumar and that he had given any instruction to the said Mr. Kumar. The appellant admitted that a meeting did take place between him and the former partner of the respondent but that Mr. Kumar was not in attendance at the meeting. The appellant further stated in the affidavit that he did not agree to pay the sum of RM700,000. The appellant further stated that, that was the reason why he refused to accept the cheque since the amount in the cheque did not include the sum of RM700,000.

The learned judge allowed the reliefs sought by the respondent as stated above. We agree with the learned judge that in the present appeal there is only one issue to be determined, that is whether the appellant had given an oral instruction to Mr. C. Vijaya Kumar to deduct the sum of RM700,000 from the balance of the deposit money to be paid to the appellant and that the RM700,000 was already paid to the former partner of the respondent. Mr. Kumar at paras. 5 and 6 of his affidavit deposed that a meeting did take place between himself and the appellant where the appellant gave specific instruction for him to deduct that amount from the balance of the deposit money. The appellant in his affidavit denied having met Mr. Kumar, but there was no denial by the appellant in respect of the instruction given to the firm to make the deductions, *viz.* the RM700,000 and the fees. It is to be noted that when

the appellant took up the present action he took it against the whole firm and not against any specific solicitors. As such any instruction given to anybody in that firm, to us appears to be the instruction to the firm.

As correctly pointed out by the learned trial judge, the appellant has been the respondent's client from 1973 and the solicitors who were handling the appellant's legal matters was the former partner of the firm himself. Thus since that day it was the normal practice for the appellant to give oral instructions to the former partner, who would then carry out those instructions diligently. We agree that the relationship between the former partner and the appellant was very close, cordial and rather unique. There were mutual respects between them. This is evidenced by the fact that there was no claim of any fees being made by the former partner or by anybody in the respondent's firm against the appellant for all the legal works that had been carried out by the respondent.

The learned judge expressed the view that oral instruction as in the present appeal was not unusual between the parties and not impossible for the appellant to give even though the transactions was a RM20 million sale. The learned judge then went on to deal with the documentary evidence. His Lordship referred to the contents of the letter dated 16 August 1995 written by Mr. Kumar to the appellant where at para. 3 it read:

> In regards to the RM700,000 to be paid to Mr. G. Sri Ram you will recall your instructions on the matter to our Mr. C. Vijaya Kumar.

The appellant gave a reply on 25 August 1995 as follows:

> I wish to state that there is no monies owing by me to Mr. G. Sri Ram.

As can be seen from the reply the appellant denied that he owed the former partner any money but there was no denial that he had given instructions to Mr. Kumar to deduct RM700,000 to be paid to the senior partner of the firm. The letter from the respondent is clear and specific when it stated that there was such an instruction. The appellant in reply did not touch on that instruction at all. The respondent again through a letter dated 29 August 1995 to the appellant indicating that there was an instruction to deduct RM700,000 but instead of denying that instruction the appellant gave a reply that there was no monies due to the former partner of the firm. The letter dated 29 August 1995 also indicated that the respondent is taking out interpleader summons to determine that issue whether there was instruction as to the deduction on the sum RM700,000 and at the same time placed the RM700,000 in a fixed deposit. The reply which was also dated 29 August 1995 by the appellant was

very brief stating that he agreed that the sum of RM700,000 be placed in a fixed deposit pending the outcome of the interpleader summons. Nowhere in this letter can be found any denial from the appellant as to the instruction in respect of RM700,000.

As can be seen from the correspondents between the parties that there were ample opportunities for the appellant to refute or deny the instructions given but the appellant failed to do so. It is clear from the authorities that an instruction purportedly given is binding unless there is evidence to show that the instructions given is denied or repudiated by one of the parties to the knowledge of the other. This is shown in the case of *Taman Zahari Zabidi Sdn. Bhd. v. Adnan Sundra & Low & Anor* [1990] 1 MLJ 424. In that case, the appellant had retained the respondent to negotiate the purchase of lands at Telok Intan, Perak. The purchase of the lands were financed by Bank Bumiputera Malaysia Bhd. through a bridging finance of RM20,000,000. The bank retained the respondent to prepare the necessary documents for the loan. Pursuant to that loan, the bank issued a letter of undertaking in favour of the vendor. The appellant subsequently sent the sum of RM210,000 through a cheque to the vendor's solicitors being registration fees on the transfer of those lands to it and it also requested the bank to pay the sum of RM126,207 to the respondent as registration fees to charge the lands as security for its loan with the bank. The lands were eventually transferred to the appellant and building plans on those lands were approved by the relevant authorities. The vendor's solicitors then demanded for the release of the balance of the purchase price for the sale of those lands. At this stage, the appellant apparently changed its mind and decided not to proceed with the purchase. In order to abort the deal, the appellant sent a letter to the bank to countermand its instruction to pay the registration fees for the charges. No copy of the letter was sent to the respondent. The vendor's solicitors offered a loan to the respondent for the sum required for the registration fees and the respondent secured the loan from the vendor's solicitors, registered the charges and instructed the bank to release the balance of the purchase price amounting to RM17 million to the vendor. The respondent brought an action to claim disbursement of the sum of RM126,207 which they had made on behalf of the appellant. The appellant refused to pay, contending that the respondent had acted against its interests. The learned judge found that the appellant's contention was baseless and awarded judgment for the respondent. The appellant appealed. The Supreme Court held that on the facts of this case, the respondent had not at any time acted in contravention of any instruction from the appellant. All along, the respondent was acting in accordance with the instruction of the appellant regardless of the facts that the sum required for the stamp duty had not been paid by the bank but advanced by the solicitors for the vendors.

Abdul Hamid LP (as he was then) at p. 426 said:

> Viewed in the light of these facts, it is clear that all along the respondent was acting in accordance with the instruction of the appellant regardless of the fact that the sum required for the stamp duty for the transfer had not been paid by the bank but advanced by Mah & Partners. It would have been otherwise, or in other words, the respondent may be said to have acted in contravention of the appellant's instruction if the appellant had given notice to the respondent of their letter of 13 December 1982 to the bank countermanding the instruction given on 2 December 1982. There was nothing of that sort here.
>
> The appellant's letter to the bank dated 2 December 1982 was not copied to the respondent. Nor was the respondent informed by the bank of the appellant's letter countermanding the earlier instruction. It is evident that the respondent had no knowledge whatsoever of the appellant's countermanding instruction. For these reasons, we have no reason to hold that the respondent had any time acted in contravention of any instruction from the appellant. ...

As can be seen from that case whether an instruction has been given or not, is a question of fact. In the present appeal the learned judge found that there are sufficient evidence to show that the appellant had given instruction to Mr. Kumar to deduct the sum of RM700,000 which was to be paid to the former partner of the respondent. The learned judge also found that there was no denial of that instruction given or any countermanding instruction otherwise. Since this is the finding of the trial judge and the appellant has not convinced us that the finding of the learned judge was wrong, that finding will stand. The burden is on the appellant to convince us, the appellate court, that the learned judge was wrong in his conclusion. This is clearly shown in the case of *Samar binte Mansor v. Mustafa Kamarul Ariffin* [1974] 2 MLJ 71 at p. 72 where Raja Azlan Shah FJ (as he was then) said:

> ... For an appellant to succeed in an appeal against a finding of fact made by a single judge, he must convince the appellate court that the learned judge was wrong in his conclusion. That the appeal may be by way of re-hearing does not alter the situation. A hearing is not, however, a retrial of the issues. The question is not whether an appellate court can substitute its view of the facts which of course it is empowered to do so, but whether it should do so. However much an appellate court may be in an equal position with the trial judge as to the drawing of inferences, it ought not to reverse the finding of fact unless it is convinced that it is wrong. It is not whether the inferences are right but whether an appellate court is convinced that they are wrong. If that finding is a view reasonably open on the evidence, it is not enough to warrant its reversal just because an appellate court would have come to a different view. Merely differing views do not establish that either view is wrong, but in balancing these two views an appellate court should give due weight to the nature of the fact as found by the trial judge ...

It is clear to us the appellant has not convinced us that the learned judge had come to the wrong conclusion. For that reason we would not disturb the finding of the learned judge. We therefore dismissed the appeal with costs.